No. 95-1065

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
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REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,
Petitioners,

—v.—

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, CATHOLICS FOR A FREE CHOICE, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC., FAMILY PLANNING ADVOCATES OF NEW YORK STATE, INC., JEWISH WOMEN INTERNATIONAL, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL ORGANIZATION FOR WOMEN, NORTHWEST WOMEN'S LAW CENTER, WOMEN'S LAW CENTER OF MARYLAND, WOMEN'S LAW PROJECT, AND YWCA OF THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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This *amicus curiae* brief is submitted in support of Respondents Pro-Choice Network of Western New York, *et al.* By letters already filed with the Clerk of the Court, Petitioners and Respondents have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The American Medical Women's Association, American Public Health Association, Catholics for a Free Choice, Connecticut Women's Education and Legal Fund, Inc., Family Planning Advocates of New York State, Inc., Jewish Women International, Lambda Legal Defense and Education Fund, National Center for Lesbian Rights, Northwest Women's Law Center, National Organization for Women, Women's Law Center of Maryland, Women's Law Project, and YWCA of the U.S.A. are advocacy and/or educational organizations that seek to ensure women's equal rights and to protect women's access to safe reproductive health care. *Amici curiae* have a particular interest in halting the concerted violence, harassment and intimidation being directed against women seeking abortions and against clinics, physicians and staff providing abortion services. *Amici* seek to ameliorate the current public health and public safety crisis resulting from the violence and climate of fear created by anti-choice militants and the resultant shortage of physicians and clinics willing to provide abortion services. Individual statements of interest of each *amici* are attached hereto as Appendix A.

SUMMARY OF ARGUMENT

Amici curiae respectfully urge this Court to uphold the decision of the *en banc* United States Court of Appeals for the Second Circuit (hereinafter "Court of Appeals"). This Court has "regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *United States v. Grace*, 461 U.S. 171, 177-78 (1983) (citing *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966)). The district court fulfilled this need to take account of the context in which expressive activity occurs by issuing a measured response to a persistent campaign of obstructive, coercive, and harassing conduct by Petitioners and their co-defendants (hereinafter "Petitioners" or "defendants") targeted at women who seek abortions and the clinics, physicians and staff who provide these essential services in the Western District of New York. While the constitutionality of the limited restrictions on Petitioners' intimidating and disruptive activities is amply supported by the State's interests in protecting women's reproductive rights and public safety (*see* Brief of Respondents), *amici* focus on additional grounds of support recognized by this Court: The permeable buffer zone and the cease and desist provision are constitutional under this Court's well-established privacy doctrines regarding captive audiences and notice remedies.

Because the injunction protects from serious harm a captive audience exercising the constitutional right to reproductive choice, and because it does not preclude many forms of communication that could reach the targeted audience, it must be upheld as constitutional. *See Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994). This Court has firmly established the constitutionality of restrictions on harassment and coercion targeted at a captive audience. *Frisby v. Schultz*, 487 U.S. 474 (1988). Here, patients seeking time-sensitive health services in order to exercise their right to reproductive privacy cannot avoid the invasive and offensive maneuvering of the protesters and so-called "sidewalk counselors," subjecting them to serious physical and psychological harm. These patients thus comprise a "captive

audience" entitled to the protection of the limited restrictions the district court ordered to afford them access to medical facilities. These narrowly drawn provisions burden no more speech than necessary because they ensure that Petitioners have alternative avenues of communicating their message. They therefore pass muster under *Madsen* and reflect a proper balance between the privacy rights and health needs of patients and the rights of those who seek to deter them from exercising their constitutionally protected choice.

Further support for the cease and desist provision's constitutionality is found in the fact that it is appropriately conditioned on notice of unwelcomeness given by the listener. This Court has squarely held that it is constitutional to restrict speech based on notice communicated by a listener that further communication is unwanted. *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970).

The constitutionality of the challenged restrictions is also supported by analogous decisions in the contexts of domestic violence and sexual harassment. In these settings, courts have protected unwilling listeners' privacy rights by limiting harassing and intimidating speech and activities that cause harm to the recipients. In light of well-established jurisprudence upholding against First Amendment challenge protective orders to remedy domestic violence, and injunctions to prevent continuing sexual harassment in the workplace, this Court similarly should find that the challenge to the instant injunction is without merit.

ARGUMENT

I. The Buffer Zone And The Cease And Desist Provision Are Constitutional Because They Protect A Captive Audience Exercising The Right To Reproductive Privacy.

This Court repeatedly has emphasized that the "First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Soc'y For Krishna*

Consciousness, 452 U.S. 640, 647 (1981) (citations omitted); *see also Grace*, 461 U.S. at 177-78. In particular, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan*, 397 U.S. at 736. Courts protect this important privacy right through application of the captive audience doctrine.

Through this doctrine, courts account for the difference between generalized speech and speech or expressive conduct directed at an individual by protesters who "do not seek to disseminate a message to the general public, but to intrude upon the targeted [individual], and to do so in an especially offensive way." *Frisby*, 487 U.S. at 486. Accordingly, government can limit discourse where "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971). This principle carries even greater force in the reproductive health care context. The injunction at issue responds to an intolerable invasion of the privacy rights of individuals seeking to enter women's medical facilities. The buffer zone and the cease and desist provision ensure that those "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526 (quoting *Operation Rescue v. Women's Health Center, Inc*, 626 So.2d 664, 673 (Fla. 1993)), can freely exercise their constitutional right to reproductive privacy and can avoid having their health endangered through badgering and intimidation by abortion opponents.

A. The Captive Audience Doctrine Applies Here Where Patients Are Seeking Access To Reproductive Health Care Facilities.

This Court has recognized that government may regulate speech in order to protect an unwilling listener or viewer when that listener or viewer is a "captive audience." *Frisby*, 487 U.S. at 487. Given that the invasive anti-choice activities at issue here target and "capture" an audience at a medical facility attempting to exercise the right to reproductive privacy, the captive audience doctrine clearly applies here.

In *Frisby*, this Court upheld a town ordinance banning targeted picketing on the public streets[1] in front of private residences. The Court found "the target[s] of the focused picketing" to be "captive" because they had "no ready means of avoiding the unwanted speech." 487 U.S. at 487. Although "complete bans" on expressive activity in residential neighborhoods are unconstitutional, *see id.* at 486, the Court recognized that anti-choice picketing of the homes of doctors who perform abortion is an "activity [that] inherently and offensively intrudes on residential privacy," *id.* at 486, and noted that the Town Board justified the ban because targeted residential picketing "causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants." *Id.* at 477 (alteration in original).

While "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech," *Cohen*, 403 U.S. at 21 (citation omitted), this Court has responded with equal force to

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[1] In its *amicus* brief, the AFL-CIO misleadingly describes a "spectrum" of cases: on one end are cases, such as *Frisby*, "that recognize a heightened privacy interest in the home;" on the other end are cases "involving speech on the ordinary public street." Brief of AFL-CIO at 28. This mistaken analysis is highlighted by *Frisby* itself, where the speech at issue took place on public streets and sidewalks. In fact, the Court regularly protects targeted audiences from speech occurring in public spaces that are unsuited for unfettered expression; there is no right to "address a group at any public place and at any time." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (*"Cox I"*) (Black, J., concurring in part, dissenting in part). *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (upholding prohibition of solicitation of votes and display or distribution of campaign materials within 100 feet of polling place); *Grayned v. Rockford*, 408 U.S. 104 (1972) (upholding ban on picketing near school); *Cox v. Louisiana*, 379 U.S. 559 (1965) (*"Cox II"*) (upholding prohibition of certain picketing near courthouse). As *Frisby* makes clear, what is dispositive in a "captive audience" analysis is not whether the speech occurs in public, but rather whether it intolerably intrudes on the privacy of its target either because of special privacy interests implicated or because of the degree of captivity.

the need to protect certain captive audiences outside the home. For example, in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), a plurality of the Court upheld a prohibition on political advertisements in public streetcars in part because the passengers were a captive audience. *See also Lehman*, 418 U.S. at 305-08 (Douglas, J., concurring); *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978) (prohibiting daytime broadcast of indecent radio show heard in the car while father was driving with young son). The Court likewise has found that children at assemblies or graduation ceremonies in school are captive audiences. *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *Lee v. Weisman*, 505 U.S. 577, 630 (1992) (Souter, J., concurring). Moreover, even where a citizen is on a public street, the Court has applied captive audience principles to protect her from unavoidable speech. In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court upheld a regulation prohibiting vehicles from emitting loud broadcast noises while on city streets. The Court stated that "[i]n his home or *on the street* [the unwilling listener] is practically helpless to escape this interference with his privacy . . . except through the protection of the municipality." *Id.* at 87 (emphasis added).[2]

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[2] That the home has not been the determinative factor in captive audience cases is further supported by cases in which a captive audience argument was rejected. *See, e.g., Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983) (recipient of objectionable mailing can easily avert eyes and discard mail); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (same). Rather than being dispositive, presence in the home has lightened the burden on the listener to avoid unwanted speech because of the substantial privacy interests involved. *See Frisby*, 487 U.S. at 484 ("the home is different" because it is not one of the "many locations [where] we expect individuals simply to avoid speech they do not want to hear"); *FCC*, 438 U.S. at 749 n.27 ("Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away."); *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975) ("burden normally falls upon the viewer" to avoid speech); *Cohen*, 403 U.S. at 21. Thus, the Court in these cases did not

(continued...)

In short, "rights of 'captive audiences' to be free . . . of unwanted speech . . . [exist] even in traditional fora . . . when circumstances indicate a heightened need to protect the right of the [viewer or] listener to be left alone." *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 392 (2d Cir. 1995). Such a heightened need to protect captive audiences exists where "substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen*, 403 U.S. at 21, or where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik*, 422 U.S. at 209. The present context provides a classic example of a captive audience entitled to protection because the privacy interests, the potential harm, and the degree of captivity are great.

1. The Injunction Appropriately Protects Patients' Substantial Privacy Interests.

The privacy interests involved here are substantial; in fact, they are even stronger than the residential privacy protected in *Frisby*.[3] First, this case involves patients entering medical

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[2] (...continued)
dismiss the captive audience argument out of hand if the home was not implicated, but, instead, found that the viewer or listener could avoid the objectionable speech.

Given the substantial privacy interests at stake here, as in *Frisby*, the patients should not bear a heavy burden to avoid the intimidating and offensive speech. In other words, patients at a reproductive health care should not be forced to "escape" unwanted speech. However, even if the burden did fall upon them, the patients here cannot avoid the speech. *See infra.*

[3] As the Florida Supreme Court stated in *Madsen:*

> The *[Frisby]* reasoning applies with even greater force where the object of targeted picketing is the medical patient seeking treatment, rather than the home-dweller. While targeted picketing of the home threatens the psychological well-being of the

(continued...)

facilities, not "the rough-and-tumble world of politics." Brief of Family Research Council at 25. As this Court has recognized, medical settings demand tranquility:

> Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and [her] family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.

Madsen, 114 S. Ct. at 2528 (alteration in original) (citations omitted);[4] *see also NLRB v. Baptist Hospital*, 442 U.S. 773 (1979) (recognizing right to ban solicitation in hospitals where such activity interferes with patient care); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (same); *Frye v. District 1199*, 996 F.2d 141 (6th Cir. 1993) (in response to disruption caused by striking nursing home workers outside facility, court upholds injunction limiting number of picketers to three and prohibiting picketing within twenty-five feet of nursing home driveway). Privacy is thus critical to patients seeking care at medical facilities, who are no more "free to come and go", Brief for Petitioners at 42, than are residents of a home. *See Pro-Choice*

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[3] (...continued)

> "captive" resident, targeted picketing of the hospital or clinic threatens not only the psychological but the physical well-being of the patient held "captive" by medical circumstance.

Operation Rescue, 626 So. 2d at 673.

[4] *See also Pro-Choice Network*, 67 F.3d at 389 (quoting *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1433-34 (W.D.N.Y. 1992)) ("Here, in the context of health care facilities treating women who are already undergoing the stress normally associated with having an abortion, there is an attendant need for a calm, quiet, stress-free atmosphere.").

Network, 799 F. Supp. at 1434 (defendants' "noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in such a setting").

Privacy in this context also implicates autonomy. "The right to make our own choices is essential to our conception of ourselves as free thinking, independent, autonomous individuals." Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 Hastings Const. L.Q. 85, 108 (1991); *see Pro-Choice Network*, 799 F. Supp. at 1435 ("To think as one chooses, to believe as one wishes, are important aspects of the constitutional right to be let alone.") (quoting *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)). Integral to this autonomy is "the ability to choose for ourselves what ideas and thoughts we want to be exposed to." Strauss, *supra*, at 110. This Court has long recognized that this right to privacy encompasses not only personal decisions generally, but particularly decisions involving abortion and procreation. *See Roe v. Wade*, 410 U.S. 113, 153-54 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("[t]hese matters[] involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").[5] Accordingly, women who seek access to medical facilities in order to exercise their constitutionally-protected right to reproductive privacy are entitled to protection from the invasive activities of the defendants, which infringe upon this right by impeding their ability both to make reproductive choices free from unwanted intrusions and to effectuate these choices.[6]

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[5] *See also Hill v. City of Lakewood*, 911 P.2d 670, 675 (Colo. Ct. App. 1995) (impermissible to "limit[] . . . the right of a private citizen to determine whether to permit others to confront [her] concerning medical care or treatment"), *cert. denied*, No. 95SC593, 1996 Colo. LEXIS 136 (Feb. 26, 1996).

[6] In addition, the constitutional right of "informational privacy," protecting the confidentiality of women seeking abortions, *see Casey*, 505 U.S. at 898, 901 also supports an application of the captive

(continued...)

2. Absent The Injunction, Patients Would Be At Risk Of Substantial Harm.

The need to protect a captive audience seeking reproductive health care is highlighted by the severe harms caused by defendants' tactics.[7] The hostile and intimidating confrontational tactics employed by anti-choice individuals severely endanger women's health: "This harassment and intimidation causes stress and sometimes even physical injury to the patients . . . and generally disrupts the atmosphere necessary for rendering safe and efficacious health care." *Pro-Choice Network*, 67 F.3d at 383. As exemplified by the experiences in the instant case, these harassing and charged encounters impede women's access to necessary health care at crucial moments, and in some cases produce traumatic physical and psychological effects.[8]

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[6] (...continued)
audience doctrine here. Defendants invaded this informational privacy by videotaping women seeking access to the clinics, as well as their vehicles and license plates, in order to create the legitimate "fear that their identities might be revealed." *Pro-Choice Network*, 799 F. Supp. at 1426.

[7] These harms are greater than those relied on by this Court in *Frisby*, where the Court did not rely on any showing that the picketing caused harm to the targeted abortion provider or his family. At a minimum, to intrude upon the privacy of the patients here in such a harmful way is as "especially offensive" as was the targeted residential picketing in *Frisby*. 487 U.S. at 486.

[8] These effects are particularly detrimental for women who need an abortion to protect their health, such as when they suffer from preeclampsia, eclampsia, hemorrhaging, diabetes, kidney disease, lupus, congenital heart disease and advanced coronary artery disease, and cancer. *See Williams Obstetrics* 790-92 (F. Gary Cunningham et al. eds., 19th ed. 1993); D. Danforth and J. Scott, *Obstetrics & Gynecology* 433, 441-42, 494-97 (5th ed. 1986); G. Burrow & T. Ferris, *Medical Complications During Pregnancy* 41 (3d ed. 1988); C. Pauerstein, *Clinical Obstetrics* 630, 647 (1987); *Rovinsky and Guttmacher's*

(continued...)

Patients are targeted for harassment immediately prior to, during, and after a surgical procedure.[9] As detailed by the district court, coercion and intimidation at this time heighten the health risk for women. "Women who have been the target of 'sidewalk counseling' or other 'rescue' demonstrations usually enter the medical facilities visibly shaken and severely distressed." *Pro-Choice Network*, 799 F. Supp. at 1427. Stress and anxiety cause hypertension and elevated blood pressure, and often require sedation or special counseling; "[p]atients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery." *Pro-Choice*

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[8] (...continued)
Medical, Surgical & Gynecological Complications of Pregnancy 512-15 (S. Cherry et al eds., 3d ed. 1985). Women who are compelled to terminate their pregnancies due to severe fetal anomalies, because their pregnancies result from rape or incest, or for many other personal and moral reasons also are at risk of significant harm as a result of defendants' activities.

[9] Here, as in *Madsen*, "the picketing is directed primarily at patients and staff of the clinic." 114 S. Ct. at 2527. Certain women visiting the clinics are especially pegged for abuse: "The 'sidewalk counselors' target younger-looking women because they are the ones most likely to be seeking an abortion. They also target cars that arrive at the facilities with out-of-state license plates. . . ." *Pro-Choice Network*, 799 F. Supp. at 1425.

Whether it be intimidating a woman by crowding her or bounding her after she requests no further face-to-face "counseling," "the temptation and opportunity for coercion or obstruction are at their greatest." *Pro-Choice Network*, 67 F.3d at 396 (citing *Frisby*, 487 U.S. at 486). *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (upholding content-based statutory restriction on employer speech because risk of nonpersuasive coercion great in labor relations setting); *Lee v. International Society for Krishna Consciousness*, 505 U.S. 672, 684 (1992) (upholding ban on solicitation at airport because "face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.").

Network, 799 F. Supp. at 1427.[10] These conditions, in turn, will force physicians to anesthetize their patients with higher doses of sedatives or, if the hypertension is severe, to turn the patient away altogether. *Id.* In some instances, these conditions "lead[] to incomplete or inaccurate health history reports which the client completes soon after entry to the [clinic]." *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 859 F.2d 681, 683 (9th Cir. 1988). Moreover, the stress from anti-abortion demonstration tactics can prolong a patient's recovery time, *see, e.g., American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 662 (E.D. Pa. 1985), and often adversely affect a patient's post-operative psychological health, *see* Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 Journal of Social &

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[10] Among the plethora of tactics used by the protesters to stress patients is the invasion of their personal space. Dr. Alice Hoagland, an expert in behavioral medicine and "social impact theory," testified that invasions by a large number of people can be a significant adverse stress factor from as far away as 25 feet; from five feet or less -- even by only a few demonstrators -- could cause a stress reaction that is extreme. Preliminary Injunction Transcript at 742-53. Her testimony is in accord with accepted "social impact" theory, *see, e.g.*, Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding* 54, 62 (1975) ("[C]lose contact with strangers . . . is aversive and leads to discomfort . . . . [W]hen someone crosses a personal-space boundary, anxiety or stress often results."); Edward T. Hall, *The Hidden Dimension* 122 (1966) ("When stress increases, sensitivity to crowding rises -- people get more on edge -- so that more and more space is required as less and less is available"), and particularly as that theory relates to anti-choice activity at abortion clinics, *see* Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations*, 12 Population and Environment 379, 386 (1991) ("The strategy of antiabortion activists is to make the targets of their protests acutely uncomfortable by purposefully violating accepted cultural norms for the use of space, and to use social distances in deliberately inappropriate ways."). *See generally* Robert Sommer, *Personal Space: The Behavioral Basis of Design* 26-57 (1969); Hall, *supra*, at 107-122.

Clinical Psychology 404 (1994) (impact study of anti-abortion demonstrations conducted at plaintiff Buffalo Gyn Womenservices during summer of 1990 revealed that such demonstrations increased post-abortion depression).

Additionally, patients who are prevented or intimidated from gaining access to a clinic, or sent home because of their anxiety, delay obtaining their abortions.

> This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded . . . complications may result.

Pro-Choice Network, 799 F. Supp. at 1427.[11]

The stress caused by defendants' tactics -- and the hesitancy to enter the clinics -- is aggravated by patients' reasonable fear of violence. Patients and staff are well aware of the extreme measures abortion opponents have taken against patients seeking

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[11] *See also Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991) (women are often so upset by protesters that they reschedule appointments and obtain later, and therefore more dangerous, medical procedures); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989) (woman denied necessary medical services in Pennsylvania as a result of blockade), *aff'd*, 919 F.2d 857 (3d Cir. 1990).

reproductive health care and their health care providers. Since 1977 there have been more than 1,800 acts of violence towards abortion providers, staff, and patients. These include 5 murders, 12 attempted murders, 41 bombings, 106 arsons, 266 death threats, 97 assaults, 2 kidnappings, and 351 clinic invasions. National Abortion Federation, *Incidents Of Violence and Disruption Against Abortion Providers, 1995* 1 (Jan. 1996). These events are seldom isolated, local events; they are part of a campaign coordinated and planned strategically on a national level. For example, the "success" of a massive clinic assault and blockade mission headed by Operation Rescue in Wichita, Kansas in 1991, *see United States v. Cooley*, 787 F. Supp. 977, 980 (D. Kan. 1992), led it to launch similar campaigns. Only two months after the district court issued a preliminary injunction in this case, Operation Rescue conducted the massive "Spring of Life" blockade campaign in Buffalo, in which over 600 arrests were made and five defendants in the instant case pleaded guilty to criminal contempt for violating the preliminary injunction.[12] This Court must consider the national climate of fear created by anti-choice violence when analyzing the privacy interests of the patients at the clinics and the impact of harassment on those patients who come to clinics already fearing potentially deadly violence.[13]

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[12] Shortly thereafter, Petitioner Schenck conducted a nationwide "twelve-week Operation Rescue training program designed to teach leaders in the anti-abortion movement the most effective techniques to further their cause." Lynne Bumpus-Hooper, *Anti-Abortion Leader Draws 'Battle Plan,'* Orlando Sentinel Tribune, February 21, 1993, at B3. He urged anti-abortion activists, *inter alia*, to become "subversives," and to blockade and gain control of medical facilities. *Id.*

[13] Indeed, the context of fear and intimidation surrounding reproductive health care clinics is similar to other contexts where the government's interest in public health and safety justify restrictions on speech. Recognizing that context can alter the meaning of speech, *i.e.*, a "message" in one context can become a "threat" in another, the federal courts have upheld even content-based restrictions on speech in order to

(continued...)

3. The Patients Here Are Truly "Captive" To Petitioners' Invasive Tactics.

In addition to the substantial privacy interests at stake, as well as the severe harm caused by infringement of these interests, application of the captive audience doctrine is compelled by the degree of captivity of the patients needing to enter the medical facilities. As the district court found, these patients "cannot, as a practical matter, escape" defendants' expressive activity. *Pro-Choice Network*, 799 F. Supp. at 1436.

The court's factual findings illustrate an arsenal of extreme tactics employed by the defendants which render patients unable to avoid them. On a regular basis -- both before and after the court's initial injunction -- patients, Respondent clinics and physicians, and their staff have been confronted with harassment, intimidation, and physical abuse by the defendants. *See id.* at

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[13] (...continued)
protect public health and safety. For example, although a statute prohibiting comments or jokes about a "bomb" or "hijacking" might be unconstitutional in some contexts, the courts have upheld statutes criminalizing even offhand remarks about bombs or hijacking if made in airports or airplanes. *See United States v. Irving*, 509 F.2d 1325 (5th Cir.), *cert. denied*, 423 U.S. 931 (1975); *United States v. Omirly*, 488 F.2d 353 (4th Cir. 1973); *United States v. Rutherford*, 332 F.2d 444 (2d. Cir.), *cert. denied*, 377 U.S. 994 (1964); *United States v. Allen*, 317 F.2d 777 (2d. Cir. 1963); *Taylor v. United States*, 358 F.Supp. 384 (S.D. Fla. 1973); *United States v. Silver*, 196 F. Supp. 677 (E.D.Pa. 1961). In doing so, courts not only recognized the heightened interests in security and public safety inherent in airline travel, but also looked to the history of aviation terrorism and the consequences of terrorist threats -- whether real or pranks -- that led Congress to enact laws banning such speech. Accordingly, Petitioners' exhortation for the Court to "address the present petition independent of the national controversy out of which it arises," Brief for Petitioners at 18, is in direct conflict with constitutional jurisprudence. *See also Burson*, 504 U.S. at 200-06 (100-foot polling buffer zone was necessary to ensure the right to vote in light of this country's history of voter intimidation and election fraud).

1423-27. Defendants physically blockaded clinic entrances, often by chaining themselves together. *Id.* at 1424. They formed "constructive blockades" by congregating around the entrances and in the driveways, making loud and disruptive noises, and harassing patients and staff. *Id.* They further forced themselves upon and intimidated patients and staff by surrounding, pushing, grabbing, shoving, and yelling at them. *Id.* They also engaged in so-called "sidewalk counseling," where anti-choice "counselors" yell at, badger, and harass patients while invading their personal space. *Id.* at 1424-25. "[E]ven when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message." *Id.* at 1436.[14]

These pitched activities "force women seeking access to [the medical facilities] to run a gauntlet of demonstrators, picketers and 'sidewalk counselors.'" *Id.* They cannot avoid the throngs of protesters who complicate access to the clinic in order to deter them from receiving health care; nor can they evade the persistent badgering of "sidewalk counselors. They are crowded and pursued, their personal space is invaded, their eyes and ears are bombarded. As in *Lehman*, where they go, so goes the message.[15]

These patients cannot "simply . . . avoid speech they do not want to hear." *Frisby*, 487 U.S. at 484. "Defendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid

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[14] *See also Pro-Choice Network v. Walker*, 994 F.2d 990, 992 (2d Cir. 1993) (involving contempt judgments in case at bar) (one of the defendants pursued and harassed patients for an entire city block, even after repeatedly being asked to leave them alone).

[15] However, unlike the commuter in *Lehman*, or the driver in *FCC*, patients cannot escape the protesters' harassment by simply looking away or turning the channel. Thus, the degree of captivity is even greater here than in cases relying on that factor to support application of the captive audience doctrine.

receiving defendants' message." *Pro-Choice Network*, 799 F. Supp. at 1436. Unlike the drive-in movie passersby in *Erznoznik* and the courtroom visitors in *Cohen*, women targeted and pursued while seeking access to reproductive health clinics for medical care cannot avoid offensive and relentless "sidewalk counseling" by looking in a different direction; nor should they have to "stop up [their] ears."[16] *Madsen*, 114 S. Ct. at 2529; *cf. FCC; Bethel School District*. Unlike the recipients of objectionable mail in *Bolger* and *Consolidated Edison*, patients here cannot simply take the defendants' "messages" and toss them in the trash.

In sum, as this Court recognized in *Madsen*, patients seeking access to reproductive health clinics are a captive audience entitled to protection: "[T]argeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 114 S. Ct. at 2526 (citation omitted).[17] Thus, "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the [invasiveness] of political protests." *Id.* at 2528. Ultimately, "[t]he only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion." *Pro-Choice Network*, 799 F. Supp. at 1436. This

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[16] To do so would directly infringe on the patient's autonomy: "by closing off one's ears, one cannot listen to those sounds one wishes to hear." Strauss, *supra*, at 118.

It is no answer to suggest that women seeking access to the medical facilities are not a captive audience because they are exposed to objectionable speech for a limited time. *See* Brief of AFL-CIO at 27. Even brief exposure to the harassment and intimidation by defendants can adversely effect the patients' health. Thus, as this Court found in dismissing a similar argument in *FCC*, "[this] is like saying that the remedy for assault is to run away after the first blow." 438 U.S. at 748-49.

[17] *See also id.* at 2533 (Stevens, J., concurring in part, dissenting in part) (The First Amendment "does not encompass attempts to abuse an unreceptive or *captive audience*") (emphasis added).

burden is too great. Accordingly, the district court properly recognized that the state has a significant interest here in protecting a captive audience through the limited restrictions against the defendants' invasive tactics.

B. The Injunction Protects This Captive Audience And Burdens No More Speech Than Necessary.

The narrow injunctive provisions protect women attempting to exercise their constitutional right to reproductive choice from the harms caused by aggressive and hostile abortion opponents. *See Pro-Choice Network*, 67 F.3d at 391-92 (provisions "provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators"). Moreover, they allow ample opportunity for these demonstrators to convey their message. Thus, because these provisions burden no more speech than necessary to serve an important governmental interest, they pass constitutional muster under *Madsen*. 114 S. Ct. at 2525-28.

As in *Madsen*, the buffer zone is necessary to ensure access to the clinics and to soften the blow of the myriad anti-choice confrontational tactics which "[take] their toll on the clinic's patients."[18] *Pro-Choice Network*, 67 F.3d at 388 (quoting *Madsen*, 114 S. Ct. at 2521). The buffer curtails the harassment that begins the moment the woman approaches the facility and continues even as she is leaving, and prevents the "constructive blockades" which frequently result in delayed medical care. *See Pro-Choice Network*, 799 F. Supp. at 1424. It alleviates the crowding, yelling, pushing, and grabbing which "cause[] stress and sometimes even physical injury," *id.*, and prevents the invasions of patients' personal space, *id.*, which can have significant adverse physical and psychological effects.

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[18] *See Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1329 (D. Minn. 1995) (upholding "buffer zone . . . adopted as a practical device used by the police to protect those actively exercising their rights from those who would prevent its exercise").

Although the radius of the buffer is only fifteen feet, this distance is sufficient to give patients critical personal space to avoid the most disturbing "in your face" tactics, and helps create the "atmosphere necessary for rendering safe and efficacious health care." *Id.* Yet, at the same time, the district court's "carefully drawn restriction[]," *id.* at 1434, is limited to allow ample opportunity for the speech of those seeking to stop women from receiving that care. In assessing the burden to speech in *Madsen*, this Court found significant that "the buffer zone was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic. . . . Protesters standing across . . . from the clinic can still be seen and heard . . . ." 114 S. Ct. at 2527. So too here, a buffer with "a very short radius [of] fifteen feet," *Pro-Choice Network*, 67 F.3d at 389, will ensure that the protesters' "message will still be conveyed." *Pro-Choice Network*, 799 F. Supp. at 1437. Defendants "can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by." *Id.*[19] *Cf. Frisby*, 487 U.S. at 483-84 (upholding restriction on focused picketing of residences which left ample alternatives for generalized communications within neighborhood).

In fact, the term "buffer zone" is a misnomer. Because the zone has such a short radius, most non-verbal means of communication, such as placards, will not be affected. Moreover, the injunction here -- unlike the one approved in *Madsen* -- allows a significant amount of verbal expression, both because of

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[19] *See also Madsen*, 114 S. Ct. at 2524 n.2 ("petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone"); *Bering v. Share*, 721 P.2d 918, 931 (Wash. 1986) (injunction's speech-free zone in front of reproductive health care clinic provides ample opportunity for speech since for anyone desirous of counseling, "it is a very short walk to the end of the block where picketers are free to 'counsel'). Obviously, Petitioners need not relocate "to a meeting hall or a town park elsewhere." See Brief of The Rutherford Institute at 11.

its radius and because counseling is permitted without geographic restriction if not rebuffed by a patient. Thus, as the Court of Appeals deemed it, "permeable buffer" better describes the restriction on speech communicated towards women inside the zone. *Pro-Choice Network*, 67 F.3d at 387.

The injunction's mandate that the permeable buffer zone float with the patient or her vehicle as they approach or leave the clinic also is necessary. Given a buffer of only fifteen feet around the clinic entrance, the district court employed a float to ensure that patients can get between their cars and the clinics without having anti-choice extremists approach them at close range unless they want it. *See Hill*, 911 P.2d at 674 (eight-foot personal zone within 100-foot radius from clinic entrance "depriv[es] protesters of the opportunity to intimidate or make other physical contact with the patients or staff"); *State v. Baumann*, 1995 Wisc. App. LEXIS 261, at *21, 532 N.W.2d 144 (Wisc. Ct. App. 1995) (injunction's "ten-foot bubble [surrounding any person entering or exiting the clinic] . . . ensures freedom of movement, free of intimidation, for those who do not wish to engage in conversation"); *Hirsh v. City of Atlanta*, 401 S.E.2d 530, 534 (Ga. 1991) (injunction's 5- foot cease and desist bubble that extends 50 feet from clinic "affords a clinic patient, physician, or employee the ability to exit a vehicle and approach the site of medical care without being swarmed, jostled, and yelled at from close range by protestors").

Indeed, the district court's approach was quite conservative. It refused to employ a larger, non-moving buffer -- even one, as in *Madsen*, that imposes an *absolute* ban on speech -- which would have moved demonstrators even further away from their targets, despite the fact that these more restrictive zones have consistently withstood judicial scrutiny in this Court. *Cf., e.g., Madsen* (36-foot no-speech zone); *Burson* (100-foot zone around polling entrances); *Boos v. Barry*, 485 U.S. 312 (1988) (prohibition on congregating within 500 feet of foreign embassy); *Cox II* (ban on picketing near courthouse applied to prohibit protesters from coming within 100 feet of state courthouse in

Baton Rouge).[20]

Burson is particularly instructive because, in the face of countervailing fundamental rights and an analogous need to gain access to a physical facility in order to exercise that right, the Court upheld under strict scrutiny a content-based restriction more burdensome than the content-neutral restriction at issue here. *Burson* upheld a Tennessee statute that -- in order to combat voter intimidation and election fraud -- imposed a 100-foot buffer zone around polling entrances in which votes could not be solicited and campaign materials could not be displayed or distributed. The intimidation of women exercising their fundamental right to reproductive choice in this case is at least as compelling as the historical voter intimidation and election fraud recognized in *Burson*. In *Burson*, the Court noted that "labor men" were afraid to vote and stayed away from the polls, 504 U.S. at 201 n.7, and that agitators engaged in heated competition involving "sham battles" aimed at keeping away elderly and timid voters. *Id.* at 202. Similarly, the district court below discussed the often "charged encounters" at the clinics during which the "sidewalk counselors" invaded the women's personal space and persisted to harass, badger, intimidate and yell "even after the patients signal[ed] their desire to be left alone." *Pro-Choice Network*, 799 F. Supp. at 1425. Just as the campaign agitators in *Burson* targeted elderly and timid voters, the "sidewalk counselors" here target young women and those who occupy cars with out-of-state license plates. *Id.* The need for safe, unfettered access to medical facilities here is at least as compelling as the need for safe access to polling places. Given *Burson*'s holding that the 100-foot buffer zone met strict scrutiny, it would defy reason for

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[20] *See also, e.g., Murray v. Lawson*, 649 A.2d 1253 (N.J. 1994) (upholding injunction's 100-foot buffer around home of abortion provider), *cert. denied*, 115 S. Ct. 2264 (1995); *Baumann* (affirming twenty-five foot buffer zone around reproductive health care clinic, noting it is even less restrictive than the zone in *Madsen*); *Portland Feminist Women's Health Center*, 859 F.2d at 685-87 (affirming injunction's twenty-five foot clear zone around the entrance to reproductive health care facility).

this Court not to find that the narrower bubble zone here meets the more relaxed *Madsen* standard.

Like the buffer zone, the cease and desist provision "ensures that the injunction does not hamper Project Rescue's message, only its intimidating method of demonstration." *Pro-Choice Network*, 67 F.3d at 389. It prohibits only harmful tactics -- intimidation, harassment, the invasion of personal space, and badgering -- foisted upon a captive, unwilling audience in need of medical care. *See id.* at 391. This Court must recognize that, in the context of reproductive health clinics, persistent "counseling" in the face of a request to withdraw *is not* "peaceful." *Madsen*, 114 S. Ct. at 2529. Thus, "the 'cease and desist' provision is necessary in order to protect the right of people approaching and entering the facilities to be left alone." *Pro-Choice Network*, 799 F. Supp. at 1435. Moreover, because this provision protects patients only from unwanted communication, it allows more speech than have the restrictions in other captive audience cases:

> In this case, the "cease and desist" provision shields only unwilling listeners from defendants' message. In *Lehman* and *Kovacs*, however, both willing and unwilling listeners were prevented from hearing the speakers' message. Thus, the Court's "cease and desist" provision advances the values of the marketplace of ideas by permitting listeners to exercise their autonomy to make their own determinations among competing ideas. Once a woman seeking access to one of the clinics has made a determination not to listen to defendants' message, defendants must respect her choice.

Pro-Choice Network, 799 F. Supp. at 1436.

II. The Cease And Desist Provision Also Is Constitutional Because It Is Only Triggered By The Targeted Patient Communicating Her Unwillingness To Hear Additional "Counseling."

This Court has held that a "notice remedy"-- by which a restriction on expression is triggered when a targeted recipient gives notice that further communication is not desired -- is a constitutional means of protecting one's right to be let alone. *Rowan*; *see also Martin v. Struthers*, 319 U.S. 141, 148-49 (1943) (householders have right to indicate that they are unwilling to be disturbed by door-to-door distribution of literature). "The First Amendment protects the right of a prospective recipient of [speech] to refuse the communication as well as the right of the prospective communicant to offer it." *Sabelko v. City of Phoenix*, 68 F.3d 1169, 1173 (9th Cir. 1995) (upholding cease and desist ordinance governing abortion clinics) (citing *Martin*; *Schneider v. State*, 308 U.S. 147 (1939).

In *Rowan*, this Court unanimously upheld a federal statute that allows a recipient of unwanted mail to give notice to the sender that she wishes no further mailings and requires the sender both to remove the recipient's name from its mailing lists and to stop all further mailings to that person. In upholding the statute, the Court relied on the fact that it called for a notice remedy, as well as the fact that the mailings were offensive and intrusive. The Court noted that under the statute, "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." 397 U.S. at 737. Although the statute "impede[s] the flow of even valid ideas, . . . no one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 738. *See also Consolidated Edison*, 447 U.S. at 542 n.11 (state could achieve goal of "protecting consumers against overly intrusive bill inserts . . . by requiring [company] to stop sending bill inserts to the homes of objecting customers").

The cease and desist provision operates virtually identically to the notice remedy in *Rowan*, in that a "sidewalk counselor"

need not cease communicating face-to-face until the targeted patient gives notice that she does not wish further "counseling." The provision here, however, is on even stronger constitutional footing than that in *Rowan*. While the inconvenienced householder in *Rowan* merely had to throw out unwanted mail, *see also Consolidated Edison*, 447 U.S. at 542, the patients trying to enter reproductive health care facilities have no choice, absent an injunction, but to listen to persistent anti-choice badgering and harassment. Moreover, as a result of the anti-choice "counselor's" unwillingness to take "no" for an answer, the potential physical and psychological harm caused by his communication is more severe than that of the merely offensive unwanted advertisements in *Rowan*. *See Pro-Choice Network*, 799 F. Supp. at 1424-26.

Unlike the cease and desist provision here, the "no approach" provision that the Supreme Court invalidated in *Madsen* did not contain a notice remedy. Rather, that provision barred demonstrators from "proffer[ing] their advice at an intimate range unless the counselees 'indicate[d] a desire to communicate by approaching or by inquiring of the [counselors].'" *Pro-Choice Network*, 67 F.3d at 390 (quoting *Madsen*, 114 S. Ct. at 2522). Thus, the *Madsen* remedy, which disallowed speech unless the prospective listener invites it, is very different than the remedy here, where speech is allowed until the listener says "stop." As the Court of Appeals in this case and the Ninth Circuit Court of Appeals have found, this distinction is dispositive. *Pro-Choice Network*, 67 F.3d at 390; *Sabelko v. City of Phoenix*, 68 F.3d at 1173.

The cease and desist provision is consistent with the proposition that the First Amendment protects the right of every citizen to "reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *see also* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 Nw. U. L. Rev. 153, 193 (1972) (a "notice remedy" "preserv[es] for those wishing to speak an opportunity to get at least 'one shot' at all potential audiences"). Like the statute in *Rowan*, but unlike the "no approach" provision in *Madsen*, the cease and desist provision

does not prevent "sidewalk counselors" from reaching willing listeners. *Cf. FCC*, 438 U.S. at 766 (Brennan, J., dissenting) (distinguishing *FCC* on this basis because the FCC ban prohibited willing listeners form hearing the broadcast); *Lehman* (curtailing speech even to willing viewers).[21] Because the notice remedy is invoked only when the listener indicates that no further communication is desired, this tips the "scales" in favor of "the right of every person to be let alone." *Rowan*, 397 U.S. at 736; *see Madsen*, 114 S. Ct. at 2533 (Stevens, J., concurring in part, dissenting in part) (although the speaker has the "*right to offer* 'sidewalk counseling'," this right "does not encompass attempts to abuse an unreceptive or captive audience") (emphasis added).

III. Injunctions Have Consistently Been Granted In Other Contexts Where The Right Of The Listener To Be Left Alone Outweighs The Interests Of The Speaker.

The correctness of the Court of Appeals' decision becomes even more apparent when it is viewed in light of other areas of law where courts have adopted context-sensitive First Amendment analyses and allowed listener-protective relief to prevent unique harms. Of especial relevance are decisions rejecting First Amendment challenges to comparable restrictions in the domestic violence and sexual harassment contexts.

Orders of protection -- like the injunctive provisions at issue -- restrict speech based, in part, on injury and harm to the recipient. Cognizant of this harm, courts have consistently rejected First Amendment challenges to orders of protection and domestic violence statutes. *See* Catherine F. Klein & Leslye E.

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[21] Petitioners' use of *Jones v. City of Opelika*, 316 U.S. 584 (1942) (Stone, C.J., dissenting), *adopted on rehearing as opinion of Court*, 319 U.S. 103 (1943) (per curiam), is inapposite. *See* Brief for Petitioners at 37. That case dealt with a publisher who, no matter whether he "withheld" or "withdrew" the privilege to publish, prevented the audience from receiving the restricted message. In the instant case, it is the audience itself -- the patient -- who decides. Thus, the fact that she first hears the message is meaningful.

Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 905, 907 (1993). For example, in *Schramek v. Bohren*, 429 N.W.2d 501 (Wis. Ct. App. 1988), the Wisconsin Court of Appeals rejected a First Amendment challenge raised by a woman who had been ordered, pursuant to the state spousal abuse statute, to stay away from her husband's residence, to avoid contacting her husband unless he consented in writing, and to arrange visitation with their child through a third party. *Schramek*, 429 N.W.2d at 503.[22] The court noted that the statute was "not directed at free speech but at the suppression of physical abuse or the threat thereof," and that "[e]ven if the sanctions of the statute indirectly prohibit speech, the state can ban speech directed primarily at those who are unwilling to receive it." *Id.* at 506 (citing *Frisby*, 108 S. Ct. at 2504).

Similarly, in *State v. Hauge*, 547 N.W.2d 173 (S.D. 1996), the South Dakota Supreme Court responded to a campaign of physical and verbal abuse of the defendant against his ex-wife by issuing a protective order directing defendant to "not verbally contact Plaintiff in any manner, which includes phone contact or contact through third parties, and . . . not verbally abuse or threaten Plaintiff." *Id.* at 174. In rejecting a First Amendment challenge, the court held that the protective order satisfied the

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[22] The plaintiff in *Schramek* challenged the state spousal abuse statute itself rather than the protective order. Domestic violence and spousal abuse statutes are directly analogous to the injunctive provisions here because those statutes specifically authorize broad injunctive relief based on "reasonable grounds" that an individual already has or might in the future engage in domestic abuse. *See, e.g.*, Wis. Stat. § 813.12 (1994), *cited in Schramek*, 429 N.W.2d at 504; Klein & Orloff, *supra*, at 901 ("Most state statutes recognize the relevance of a past abusive act to provide a context to evaluate present fear and danger."). Moreover, the proposition that "there must be a long history of repeated wrongful or threatening behavior of a specific defendant against a specific plaintiff" in order to justify a buffer zone, Brief of Family Research Council at 12 n.7, if true, precisely describes the conduct of the defendants towards the health care providers and their patients in this case.

Madsen standard for injunctions. The court found that the interests in preserving residential privacy and "the mental and emotional health of the vulnerable" were compelling, and that "[t]o shield victims of domestic violence from threats and intimidation, court must sometimes prohibit all contact between the abused and the abuser." *Id.* at 176. *See also Gilbert v. State*, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) (upholding state Protection from Domestic Abuse Act and "reject[ing] any notion that the First Amendment . . . ever covered threatening or abusive communications to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse");[23] *People v. Blackwood*, 476 N.E.2d 742 (Ill. App. Ct. 1985).

The reasonable apprehension of violence and both physical and psychological harm, particularly in light of past misconduct, is common to both the clinic disruption and domestic violence contexts. As with domestic violence, "sidewalk counseling" and focused picketing by the defendants involves communications that frequently are threatening or abusive. And like survivors of domestic abuse, the women trying to obtain medical care here suffer the same reasonable apprehension of serious harm. This is reflected in the abusive practices previously employed by the defendants, and is exacerbated by the extensive history and escalating level of violence associated with anti-choice protests. Thus, just as domestic violence statutes authorize injunctive relief based on reasonable grounds of past or likely violent conduct in order to safeguard the victims of such violence, the injunction here provides patients with a means of getting into and out of a clinic without risking severe physical and psychological hardship.[24]

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[23] The husband in *Gilbert* was ordered, among other things, "not to visit with . . . or otherwise interfere with his wife . . . and to remain away from her residence." 765 P.2d at 1209.

[24] These provisions are far less restrictive of expression than the "stay away" orders and other broad restrictions in *Hauge*, *Schramek* and

(continued...)

Sexual harassment provides another analogous context. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1996), prohibits conduct and speech which constitute "quid pro quo" harassment or which create a "hostile environment." *See Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993). In *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), the court enjoined sexually harassing speech that created a hostile environment, specifically rejecting a First Amendment challenge to the hostile environment sexual harassment doctrine.[25] The court reasoned that an injunction could restrict the speech at issue because, *inter alia*, the interest in eliminating discrimination in the workplace justified the infringement on speech, that the female workers were a captive audience,[26] and that the

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[24] (...continued)
Gilbert. Rather than imposing a blanket prohibition of a wide range of conduct with no geographic limit, the buffer zone and cease and desist provisions only restrict demonstrating within a fifteen foot radius of the clinic or woman, and only restrict "sidewalk counseling" within this radius after a targeted woman communicates her unwillingness to be "counseled."

[25] The plaintiff alleged hostile environment sexual harassment based on the prominent posting of pictures of nude women throughout the workplace and the constant barrage of insulting and derogatory comments she received form male co-workers. *Id.* at 1494-99. The court enjoined the defendant company from maintaining the hostile environment. *Id.* at 1541. Prohibited conduct included sexual comments made in the presence of an employee who had indicated that such conduct was unwelcome. *Id.* at 1542.

[26] "[W]omen employees . . . may be forced to endure unwanted messages by virtue of being unable to leave the workplace. If a woman really wants to avoid the offensive speech, she may be forced to leave her job." Marcy Strauss, *Sexist Speech in the Workplace*, 25 Harv. C.R.-C.L. L. Rev. 1, 13 (1990). *See also NLRB v. United Steelworkers*, 357 U.S. 357, 368 (1958) (Warren, J., concurring in part, dissenting in part) ("[e]mployees during working hours are the classic captive audience"); *Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383, 401-02 (continued...)

injunction was narrowly tailored to remedy this discrimination. *Id.* at 1535-36. Other courts have similarly concluded that the First Amendment does not protect hostile environment sexual harassment liability under Title VII. *See, e.g., Jew v. University of Iowa*, 749 F. Supp. 946, 961 (S.D. Iowa 1990); *Jordan v. Wilson*, 662 F. Supp. 528, 533-34 (M.D. Ala. 1987); *Doe v. University of Mich.*, 721 F. Supp. 852, 862-63 (E.D. Mich. 1989); *E.E.O.C. v. Sage Realty Corp.*, 507 F. Supp. 599, 610 (S.D.N.Y. 1981).

Recognizing the serious harm that results from "[r]equir[ing] a man or woman [to] run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), this Court has signalled that the First Amendment does not prohibit remedies that restrict sexually harassing speech in the confines of the workplace. *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 389-90 (1992). For similar reasons, the First Amendment does not prohibit the narrowly drawn injunction issued here, which ensures that women needing reproductive health care can avoid "a gauntlet of harassment and intimidation"[27] in order to exercise their constitutionally protected right to choice.

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[26] (...continued)
(E.D. Pa. 1980) (workers at jobsite were captive to harassing messages delivered over loudspeakers; only way to avoid speech was to quit jobs).

[27] *Pro-Choice Network*, 799 F. Supp. at 1424.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the decision of the *en banc* Court of Appeals.

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APPENDIX

INTEREST OF AMICI CURIAE

The American Medical Women's Association ("AMWA"), founded in 1915, is a non-profit organization of 12,000 women physicians and medical students. AMWA unequivocally supports the right of the pregnant patient, in consultation with her physician, to make a personal, medically-informed decision whether or not to continue a pregnancy.

The American Public Health Association ("APHA"), founded in 1872, and with a membership of 55,000, is the oldest and largest multi-disciplinary society of public health professionals in the world. Throughout its history, the APHA has been in the forefront of countless efforts to protect and promote personal and public health. The APHA's membership includes physicians, nurses, social workers, behavioral scientists, bioethicists and maternal and child health specialists who are experts in both prenatal care, neonatology, women's health issues and drug abuse prevention and treatment.

Catholics for a Free Choice ("CFFC"), founded in 1973, shapes and advances sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being, and respect and affirm the moral capacity of women and men to make sound and responsible decisions about their lives. Through discourse, education, and advocacy, CFFC works in the United States and internationally to infuse these values into public policy, community life, feminist analysis, and catholic social thinking and teaching. CFFC has offices in Washington, DC, Mexico City, Mexico, Montevideo, Uruguay and Sao Paolo, Brazil. Individuals in forty US states operate as affiliated independent activists.

Connecticut Women's Education And Legal Fund, Inc. is a non-profit women's rights organization incorporated in 1973, with over 1,400 members. Its mission is to work through legal and public policy strategies and community education

to end sex discrimination and to empower all women to be full and equal participants in society. The Connecticut Women's Education and Legal Fund, Inc. seeks to join this brief as *amicus curiae* because it is committed to protecting women's reproductive rights and because it believes in the underlying premise that unwelcome behavior can trigger restrictions on a person's right to free expression.

Family Planning Advocates Of New York State, Inc. ("FPA") is the only statewide voluntary organization in New York dedicated to promoting access to the full range of quality, confidential reproductive health services for all women, regardless of age, income, geographical location or other circumstances. Its members include more than 140 organizations spanning a wide range of health, welfare and religious groups, including a substantial number of abortion providers, in addition to thousands of individual members. FPA believes that every woman in New York has a fundamental right, under the federal and New York State Constitutions, to privacy in determining whether or not to bear a child and that access to providers of abortion services is an integral component of this right.

Jewish Women International is an organization of 75,000 Jewish women in the United States and Canada. Among its aims is to help women in improving the quality of life for themselves, their families, and society. In line with this goal, Jewish Women International has worked for more than 20 years to assure a woman's right to choose in matters of reproductive rights. Jewish Women International believes that abortion clinic violence is pointless, destructive behavior, and it has pressed for stiff penalties to be imposed on perpetrators of these crimes.

Lambda Legal Defense and Education Fund ("Lambda") is a national public interest law organization that advocates for the rights of lesbians, gay men, and those with HIV/AIDS through impact litigation and education. The constitutional questions implicated in the struggle of women to control

their bodies are similar to those faced by lesbians and gay men who have a deep interest in the right of individuals to engage in intimate association without government interference. Lambda is specifically interested in the issue raised by this case because the right to be free from harassment and violence is of importance to lesbians and gay men, who have themselves been targets of such campaigns; at the same time, Lambda has a vital interest in assuring that, while curbing violence, the law protects legitimate protest. Lambda represents a community with a deep need and respect for the First Amendment, inasmuch as the full civil rights of lesbians and gay men have not yet been recognized. Lambda is keenly interested in striking the appropriate balance between permitting expression and curbing violence.

The National Center for Lesbian Rights ("NCLR"), formerly the Lesbian Rights Project, is a non-profit public interest law firm, founded in 1977, and devoted to the legal concerns of women who encounter discrimination on the basis of their sexual orientation. NCLR is particularly well-suited to offer *amicus* assistance to this court in this matter, as NCLR attorneys regularly litigate the constitutional issues implicated here. Specifically, NCLR is concerned about the right to be free from harassing conduct and expression, as well as the right to reproductive choice. NCLR has participated in several reproductive rights cases.

The National Organization for Women ("Now") is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 600 chapters in all 50 states and the District of Columbia. NOW has, since its inception, worked for reproductive freedom for all women. In addition to bringing the cases *National Organization for Women v. Scheidler*, 114 S. Ct. 798 (1994), and *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), it is also the plaintiff in several cases with existing injunctions similar to the ones at issue here, including *New York State Nat'l Org. for Women v. Terry*, 41 F.3d 794 (2d Cir. 1994), and *Nat'l Org. for Women v.*

Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994).

The Northwest Women's Law Center, based in Seattle, Washington, is a non-profit public interest legal organization that works to advance the legal rights of women through litigation, education, legislative advocacy and the provision of a free information and referral phone service for women with legal problems. Since its founding in 1978, the Law Center has been dedicated to representing the interests and rights of women seeking abortions. The Law Center has a long history of litigation and participation as *amicus curiae* in cases locally and throughout the country on behalf of women seeking safe and legal abortions. The Law Center has also been instrumental in the passage of legislation that provides safe access to abortion services.

The Women's Law Center of Maryland is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. The Women's Law Center has worked to protect reproductive rights for all women, including participation as *amicus curiae* in cases dealing with the issue. The Women's Law Center believes that the issues involved in this case are critical to the legal rights of women.

The Women's Law Project is a nonprofit feminist law firm based in Philadelphia, Pennsylvania devoted to winning equality and justice for women. A primary focus of the Law Project's mission is to secure reproductive freedom for all women. Since it's founding in 1974, the Law Project has challenged generations of restrictive abortion statutes on behalf of women's health care providers and the patients they serve. The Law Project served as co-counsel for plaintiffs in *ACOG v. Thornburgh*, *Planned Parenthood v. Casey*, *Elizabeth Blackwell Health Center v. Knoll*, challenging the provisions of the Pennsylvania Abortion Control Act. The Law Project devotes substantial resources toward defending

medical providers from anti-choice violence, harassment and intimidation. In *Roe v. Operation Rescue*, the Law Project won a federal injunction that continues to protect women's health care providers in southeastern Pennsylvania from mass blockades and other concerted acts of interference with patients and clinic staff. Since the tragic slayings of clinic workers in Massachusetts in December 1994, Law Project attorneys have redoubled their advocacy efforts with federal and local law enforcement officials to protect reproductive health care providers and to enforce the criminal laws vigorously against anti-choice offenders.

The YWCA of the U.S.A. was founded in 1858 and is one of the oldest women's organization in the country. Its mission is the empowerment of women and girls and the elimination of racism. It serves 1,004,000 women and their families through 374 community and student YWCAs at 4,000 sites. The YWCA of the U.S.A. is a member of the World YWCA. The YWCA supports the right of a woman to make her own decisions related to her reproductive health. The YWCA also supports measures that will assure the protection of persons from violence.